

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1939

Book Review. The Judicial Process in Tort Cases by Leon Green

Fowler V. Harper

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>



Part of the [Legal Education Commons](#), and the [Torts Commons](#)

Recommended Citation

Harper, Fowler V., "Book Review. The Judicial Process in Tort Cases by Leon Green" (1939). *Articles by Maurer Faculty*. Paper 2027.
<http://www.repository.law.indiana.edu/facpub/2027>

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

THE JUDICIAL PROCESS IN TORT CASES*

The new edition of Dean Green's case book is bound to be of unusual interest among teachers and students of Torts for the same reasons that made the first edition the subject of wide-spread attention. The general plan of arrangement in the revised edition follows closely the analysis of the former work. The materials themselves, of course, have been thoroughly re-edited and re-arranged, and a considerable number of new cases included. The total volume of material is somewhat less than the earlier edition. The number of pages is not greatly reduced, however, by reason of the larger type employed.

Aside from technical questions of scholarship, as to which no question can be raised with respect to Dean Green's work, a case book is a good one or a bad one in proportion to its effectiveness in accomplishing the editor's purpose. Whether a critic approves of a particular compilation of materials will therefore depend both upon his approval of the editor's purpose and his judgment as to the means employed. Dean Green has in his Foreword stated the objectives of his course in Torts. These are, first the classification objective, designed to afford an intellectual framework into which torts cases can be fitted. This is primarily an analytical or a formal objective. The second objective, as stated, is the attainment of "a definite grasp of legal theory and its functions." The elaboration of this objective indicates that it is primarily the instrumental or functional side of tort law that is to be emphasized. These are the two prime objectives. Incidental to these, the Dean desires his students to obtain some notion of the wide range of human activities that fall within that area of the law called "torts", to obtain some grasp of the incredibly complicated character of the problems raised by the most casual activity, and to obtain some historical perspective of law as it has been developed into social patterns.

With all of the objectives emphasized by the editor, the reviewer is in complete sympathy. The understanding of the doctrinal aspects of the law of torts is the traditional function of the course. Indeed, until recently, it may be said that it was probably the only important purpose of the course. The arrangement of these materials, however, does not appeal to the reviewer as one calculated easily to attain this result. Legal rules, principles, theories and doctrine bob up throughout the pages in the most unexpected places. Arranged as they are upon a type-fact pattern, one runs into a principle of law at any place in the volume that it may happen to be involved in the legal problem of the case. To be sure it is valuable and important for the student to understand how the principle of contributory negligence is utilized by the courts in one type of case as distinguished from another. It is important for him to realize that the doctrine of proximate cause is one of great elasticity, capable of certain adaptation in different types of cases. Intellectual

* THE JUDICIAL PROCESS IN TORT CASES, Second Edition. By Leon Green. St. Paul: West Publishing Company, 1939. Pp. 1,300. \$6.00.

sophistication requires that a student comprehend that the principle of consent is like an accordion which can be extended to include one type of case and contracted to exclude another. It is of the essence of knowledge and wisdom that a student comes to realize how courts utilize the vague principle of "intended" wrong in situations involving emotional distress and mental anguish as distinguished from tangible harm to person or property. Indeed, it is desirable that he know the difference in uses of this doctrine between situations involving emotional disturbances to men on the one hand and to women on the other. All this is highly important and necessary to one who is to have any comprehension of the law of torts. It is also necessary that the student obtain, and that he obtain quickly and effectively, a thorough mastery of the purely formal aspects of tort law. That law is, or should be, a rigorous discipline. Doctrinal lines must be drawn tight. Thinking must be straight. Anything which tends toward a sloppy intellectual performance is unfortunate. The reviewer suspects that an attempt to introduce a first year class into the realm of legal doctrine as it has been developed in tort law by sequences of cases built around factual structures is not calculated to sharpen the students' legal wits.

It is not suggested that Dean Green's students finish up the year with an inadequate knowledge of legal doctrines. The Dean is known to be a masterful teacher, and his students will obtain adequate direction in all aspects of the course. It may be suspected, however, that a knowledge of legal rules and theories is accomplished in spite of the teaching vehicle rather than facilitated by it. There is, of course, the other side of the argument. A case book built upon doctrinal lines is not, perhaps, the most admirable tool with which to indicate the real functions of tort rules. A good teacher can bring this to his classes, however, more readily than he can require the intellectual drudgery involved in mastering subtle doctrine without the ideal arrangement of materials. The gist of the argument against the functional arrangement in torts is that a mastery of doctrine must logically precede a knowledge of its use. How can a student understand the variations and shadings in the application of a legal principle to varying fact-patterns unless he has first commanded a thorough mastery of the principle in question? The reviewer has often remarked that he would recommend the use of Green's *Cases on Torts* for a graduate course in law or jurisprudence. Whether it is equally useful as a tool for first year students is highly doubtful.

Most of the material is devoted to physical harms to interests of persons and property. About 175 pages are devoted to what the Dean calls "harms of appropriation", a concept which has never appealed to the reviewer as an altogether happy one when used to include the problems of fraud and deceit. The objection to the use of the notion of "appropriation" to such things as names, history and personal services is not great. Indeed, it may be thought to have distinct advantages. When it is stretched, however, to

include the mine-run of cases in sales and credit transactions, its helpfulness is questionable. On the other hand, the conception of "relational interests" which the Dean has exploited is a fortunate one. Included therein are family relations, trade relations, professional and political relations and general social relations. A final, brief chapter is devoted to abuses of governmental power and process, which includes malicious prosecution, false arrest, illegal seizure and the like.

The Dean ran out of space when he got to "relational interests", with the result that these phases of the law are given but brief, and to the reviewer's mind, totally inadequate, treatment.

It is fortunate that all teachers of Torts do not agree upon methods and tools. Certain it is that Dean Green's work in this field has been most stimulating and provocative. More certain still, the book and the method are not of great importance. The good teacher will be effective with his students irrespective of the tools utilized.

FOWLER V. HARPER

GENERAL COUNSEL
FEDERAL SECURITY AGENCY

AN INTRODUCTION TO THE SOCIOLOGY OF LAW*

Perhaps no development within the field of jurisprudence has been more disturbing or is likely to have more significant effects than that one now commonly, if somewhat ambiguously, referred to as "sociological". It is not sociological in the sense that it was initiated or promoted by a species of outsider known as "sociology". In fact, it appears to have been of indigenous origin; it appears to have arisen directly out of jurisprudence itself as scholars in that field came under the same set of intellectual and other influences that gave rise to sociology. The inventor of the term "sociology of law", first used in a treatise published in 1892, was a student of jurisprudence. The great names in the subsequent development of the program, originally designated by the term, into a separate body of scientific knowledge are generally those of jurists. In this country, for example, nearly all of the persons with whom even professional sociologists associate the movement are jurists, men of such distinction as Pound, Holmes, and Cardozo. The movement is a phase of the general shift to a scientific point of view and method of research in all realms of inquiry.

It is not easy to define the movement. Like sociology in general and like all radical developments in the intellectual realm, its variable, tentative, exploratory expressions in its early stages were confused and confusing, full of inconsistencies, and often more puzzling

* AN INTRODUCTION TO THE SOCIOLOGY OF LAW. By N. S. Timasheff. Cambridge: Harvard University Committee on Research in the Social Sciences, 1939. Pp. xiv, 418. \$4.00.